UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2003

Argued: September 3, 2003 Decided: September 7, 2004

Docket No. 02-9274

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N.G. and S.G., as parents and next friends of
S.C., a minor child, ET AL.,
Plaintiffs-Appellants,

v.

STATE OF CONNECTICUT, ET AL.,
Defendants-Appellees.
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Before: NEWMAN, SOTOMAYOR, and WESLEY, Circuit Judges.

Appeal from the September 30, 2002, judgment of the United States District Court for the District of Connecticut (Peter C. Dorsey, District Judge), dismissing, after bench trial, a complaint alleging that strip searches of two girls in juvenile detention facilities violated their Fourth Amendment rights.

Judgment vacated; case remanded. Judge Sotomayor concurs in part and dissents in part with a separate opinion.

Thomas W. Kelly, Newport, RI, for Plaintiffs-Appellants.

Terrence M. O'Neill, Asst. Atty. General, Hartford, CT (Richard Blumenthal, Atty. General, Steven R. Strom, Asst. Atty. General, Hartford, CT, on the brief) for Defendants-Appellees.

JON O. NEWMAN, Circuit Judge.

This appeal concerns the lawfulness of strip searches performed upon young girls in juvenile detention centers. The parents of two female children appeal from the September 30, 2002, judgment of the District Court for the District of Connecticut (Peter C. Dorsey, District Judge), ruling that, even though Connecticut's blanket strip search policy for all those admitted to juvenile detention centers ("JDCs") violates the Fourth Amendment, the particular strip searches of their daughters, identified as S.C. and T.W., were lawful. The Appellants contend that the searches were unlawful for lack of a reasonable basis to believe either that the juveniles had done anything that would be a crime if committed by an adult or had possessed weapons or other contraband. The Appellants also seek review of the District Court's denial of their motion for class certification.

We conclude that the searches conducted upon each initial entry into the custody of the State's juvenile authorities were lawful, but that repetitive searches, conducted while the girls remained in custody, violated the Fourth Amendment in the absence of reasonable suspicion that contraband was possessed. We therefore vacate the judgment and remand to determine what relief, if any, should be awarded.

Background

Connecticut's judicial branch, through its Court Support Services Division ("CSSD"), operates three juvenile detention centers located in Bridgeport, Hartford, and New Haven. Connecticut also confines juveniles in other institutions with which it has contracts--the Girls Detention Center ("GDC"), operated by defendant CSI Connecticut, Inc., and Juvenile Forensic Services ("JFS"), a center operated by defendant Juvenile Forensic Services, LLP. All of these facilities, collectively referred to as "JDCs," admit thousands of juveniles annually. In Connecticut, a juvenile is either a "child," defined as "any person under sixteen years of age," Conn. Gen. Stat. § 46b-120(1) (2003), or a "youth," defined as "any person sixteen or seventeen years of age," id. § 46b-120(2).[1]

JDCs house juveniles detained for a wide variety of reasons, but the record is not entirely clear as to precisely what circumstances may result in confinement in JDCs. From the testimony of Judge Christine E. Keller, Chief Administrative Judge for Juvenile Matters, it appears that the principal basis for detention is to await trial following arrest for a serious juvenile offense. Upon arrest for a juvenile offense that is not serious, detention could also occur if the parents

[1]In Connecticut a "minor" is a person under the age of eighteen. Conn. Gen. Stat. § 1-1d.

refuse to take the child back into their home and the State's Department of Children and Families cannot promptly find a bed in a suitable facility.

Another frequent basis for detention arises from a designation known as "families with service needs." Conn. Gen. Stat. § 46b-120(8). "Families with service needs" means a family that includes a child who has acted in one of five ways: (1) run away from home without just cause, (2) become beyond the control of parents, (3) engaged in indecent or immoral conduct, (4) been a truant or overtly defied school rules, or (5) if thirteen years of age or older, has engaged in sexual intercourse with a person of similar age.[2] Id. Judge Keller explained that detention can result upon a judge's finding that one of these five circumstances exists and that there is probable cause to believe that a delinquent act has been committed. Of these five categories, the most common are runaways and truants.

The State policy. Operational Policy 311 of Connecticut's Judicial Branch Division of Juvenile Detention Services ("the Policy") provides for various searches, including frisk searches, general facility searches, area searches, perimeter searches, vehicle searches, and, pertinent to this appeal, strip searches. The Policy specifies

[2]The other person must be thirteen years of age or older and not more than two years older or younger than the child in question. Conn. Gen. Stat. § 46b-120(8)(E).

that a strip search shall be conducted upon each detainee's "initial intake" at a JDC and upon each detainee's "readmission," or after any detainee "has left the supervision of Detention Center or Judicial Branch staff (e.g., a furlough or inpatient hospital admission), or an [Alternate Detention Program] resident returning to the Detention Center to attend a court hearing." The Policy also authorizes strip searches upon "reasonable belief that a detainee may be carrying dangerous contraband."[3] The Policy applies at the three state-run JDCs and the JDCs operated under state contract.

Description of strip search.

The Policy, as amended September 1, 2002, prescribes the following steps for a staff member conducting a strip search[4] to follow:

a. Inform the detainee of the strip search and the purpose of the

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[3]The Policy defines "contraband" as "[a]nything not authorized to be in a detainee's possession, anything used in an unauthorized or prohibited manner; anything altered in any way or anything in excess of allowable limits."

[4]"Strip search" is often used as an umbrella term that applies to all inspections of naked individuals. Various other phrases have been used depending on how the search is conducted. A "visual body-cavity search" usually means visual inspection of a naked body, including genitals and anus, without any contact. See Security and Law Enforcement Employees v. Carey, 737 F.2d 187, 192 (2d Cir. 1984). A "manual body-cavity search" generally means an inspection of a naked body, including genitals and anus, by means of touching or probing with an instrument. See Blackburn v. Snow, 771 F.2d 556, 561 n.3 (1st Cir. 1985). Unless otherwise indicated, we will use the term "strip search" to mean the type of search, without visual body-cavity inspection, currently authorized by the Policy.

search.

b. Check the detainee's ears, nose and mouth, including under the tongue.
c. Have the detainee remove and step away from clothing and shoes and put on a JDC-issued robe.
d. Have the detainee run his/her own hands through his/her hair.
e. Check the bottom of detainee's feet.
f. Have the detainee raise one arm of the robe to mid-biceps and examine top and bottom of arm and hand with fingers spread. Repeat the procedure with second arm and hand.
g. Have the detainee raise the bottom of the robe to below the crotch to expose and inspect the front of the legs and feet.
h. Have the detainee turn 180 degrees and drop the robe off the shoulders in order to inspect the upper back and shoulders.
i. Have the detainee raise the bottom of the robe to above the waist in order to inspect the buttocks and legs.
j. Have the detainee turn 180 degrees (facing staff), and drop the robe off the shoulders and open the front of the robe, exposing the entire front of the body, shoulders, and upper arms.
k. Instruct the detainee to shower and dress immediately in a clean uniform.
l. Search all clothing and personal items, and label and store them appropriately.

Prior to the September 1, 2002, revision, the Policy permitted a strip search to include a visual inspection of vaginal and anal body cavities, but the revision now specifies that "[u]nder no circumstances will visual, manual, or instrument inspection of the vaginal or anal body cavities be conducted."

Strip searches of S.C. S.C. has a history of mental illness, suicide attempts, self-mutilation, sexual activity with older men, drug and alcohol abuse, and drug-peddling. In July 2000, S.C., then 14 years old, was adjudicated a member of a "family with service needs" by the Superior Court as a result of her repeated failures to obey

court orders requiring her to stay at home or at institutions in which she was placed.

S.C. testified, without contradiction, to having been strip searched eight times. The first occurred in July 2000 after Wallingford police arrested her for running away from home in violation of a court order and brought her to the New Haven Juvenile Detention Center ("NHJDC"). The strip search was conducted by a female staff member upon S.C.'s admission to NHJDC. S.C. was then presented before a Superior Court Judge, who ordered her detained at the Girls Detention Center ("GDC") pending future placement. After her return from state court, she was transported from NHJDC to GDC in handcuffs and leg shackles. The second strip search occurred upon her admission to GDC. The third strip search occurred upon her return to GDC after being transported, in handcuffs and shackles, to court. S.C. was later released to her parents under a court order not to run away from home.

Four more strip searches occurred in the fall of 2000. After S.C. had violated the above-mentioned court order, her parents called the police, who took her into custody and brought her to NHJDC. Upon her admission, a staff member performed a strip search. This was her fourth strip search. She was then presented in court, and ordered detained at JFS to which she was transported in handcuffs and shackles. The fifth strip search occurred upon her admission to JFS. The sixth

and seventh strip searches were performed during S.C.'s detention at JFS when institutional searches were conducted due to concern over a missing pencil. S.C. was later released to her parents.

The eighth strip search occurred in January 2001. After S.C. ran away from home again, the state court ordered her placed in Stonington Institute, a hospital, to await placement. S.C. ran away, but eventually turned herself in to the Wallingford Police Department. When the police delivered her to NHJDC, a staff member strip searched S.C. upon admission.

During the second and third searches, S.C. was instructed to squat and cough, as she explained, "to check if there is anything that might fall out of your cavities." The record is unclear as to whether visual inspection of vaginal or anal body cavities occurred during these two searches, but this ambiguity need not be resolved because the Policy currently in effect prohibits such inspections, and, as discussed below, we conclude that these two searches were unlawful for other reasons. No contraband was found in any of the eight strip searches.

Strip searches of T.W. T.W. was strip searched twice. In October 2000, T.W., then a 13-year-old girl with a history of persistent truancy, and possibly mental health issues, had been adjudicated a member of a "family with service needs" due to her truancy. When she violated court orders requiring her to attend the seventh grade, the

Superior Court ordered her detained at NHJDC, where a staff member strip searched her upon admission. The next day, she was transferred to GDC in handcuffs and leg shackles. Upon admission, a GDC staff member performed T.W.'s second strip search. After one week, T.W. was released to her mother.

Visual inspection of vaginal or anal body cavities was not performed during either of the two strip searches. No contraband was found in either search.

The lawsuit. S.C.'s and T.W.'s parents brought a suit under 42 U.S.C. § 1983 for damages and injunctive relief against the State of Connecticut as well as various directors and supervisors of CSSD, Juvenile Detention Services, NHJDC, Department of Children and Families of the State of Connecticut; CSI Connecticut, Inc., and Juvenile Forensic Services, LLP, individually and in their official capacities. The suit challenged the JDCs' policy of strip searching all admittees, regardless of the cause for admission, as violative of S.C.'s and T.W.'s Fourth Amendment protection from unreasonable searches.[5] They sought to bring a damages suit on behalf of a class of juveniles held

[5]The Plaintiffs acknowledge that strip searches could lawfully be conducted upon admission of those juveniles incarcerated for offenses that would be felonies if they were adults and those reasonably suspected of possession of contraband. Otherwise, they contend that a thorough pat and frisk adequately serves the State's legitimate interests.

as members of "families with service needs," arrested for noncriminal offenses, or charged with minor offenses in Connecticut, all of whom were strip searched in the named juvenile detention facilities pursuant to the Defendants' policy.

District Court ruling. After denying class certification, Judge Dorsey stated that the strip search policy, applicable to all confined children in JDCs, violated the Fourth Amendment,[6] but nevertheless ruled that the strip searches of S.C. and T.W. were reasonable. He concluded that the history of both girls "suggest[ed] prospective behavior which would predispose them to bringing various contraband into a JDC." He found S.C. to be "rebellious, defiant of authority, suicidal, belligerent, promiscuous, a drug user and dealer and mentally unstable." Acknowledging that T.W.'s truancy was "a quieter rejection of authority," he nonetheless found that her bouts of depression and expression of regret at having been born created a risk of self-injury that rendered the strip searches reasonable. The complaint was ordered dismissed.

Discussion

[6]Despite the District Court's statement that the Policy violated the Fourth Amendment, the Court's judgment contains no declaration to that effect. The judgment states only that it is "entered for the defendants and both cases are closed." We therefore have no occasion to review any ruling with respect to the facial unlawfulness of the Policy.

The Fourth Amendment prohibits "unreasonable" searches, a somewhat amorphous standard whose meaning varies with the context in which a search occurs and the circumstances of the search. In the enforcement of criminal law, a search generally requires the prior issuance of a warrant, supported by probable cause to believe that identified items will be found. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989). In some circumstances a warrant is not required, but "some quantum of individualized suspicion" must be shown. Id. at 624 (internal quotation marks omitted). Less intrusive "frisks" are permitted upon articulable suspicion concerning the person to be stopped and frisked. See Terry v. Ohio, 392 U.S. 1, 20-21 (1968).

Outside the law enforcement context, "in the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." Board of Education v. Earls, 536 U.S. 822, 829 (2002) (internal quotation marks and citation omitted).[7] "[I]n certain limited circumstances, the Government's need to discover . . . latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting

[7]The phrase "special needs," in Fourth Amendment jurisprudence, originated in Justice Blackmun's concurring opinion in New Jersey v. T.L.O., 469 U.S. 325, 351 (1985).

such searches without any measure of individualized suspicion." Id. (internal quotation marks and citation omitted). However, the "special needs" standard does not validate searches simply because a special need exists. Instead, what is required is "a fact-specific balancing of the intrusion . . . against the promotion of legitimate governmental interests." Id. at 830. This is simply an application of the overarching principle that "[t]he test of reasonableness under the Fourth Amendment . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." Bell v. Wolfish, 441 U.S. 520, 559 (1979).

These principles have been applied to permit reasonable searches, without warrants, in hospitals, see O'Connor v. Ortega, 480 U.S. 709, 725 (1987); schools, see New Jersey v. T.L.O., 469 U.S. 325, 341-43 (1985); government agencies, see National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666-67 (1989); and highly regulated industries, see Skinner, 489 U.S. at 633. Pertinent to the pending case are decisions applying the "special needs" test to uphold suspicionless drug-testing (urinalysis) of middle and high school students participating in extracurricular activities, Earls, 536 U.S. at 828-38, and students participating in school athletics, see Vernonia School District 47J v. Acton, 515 U.S. 646, 664-65 (1995).

Especially pertinent to the pending case, the "special needs"

standard applies to searches in penal institutions, see Roe v. Marcotte, 193 F.3d 72, 78 (2d Cir. 1999), although the Supreme Court's first use of the standard in this context occurred before the phrase "special needs" had been coined, see Wolfish, 441 U.S. at 559-60. In Wolfish, the Supreme Court acknowledged that when a person has been convicted and lawfully confined, constitutional protections do not cease, see Wolfish, 441 U.S. at 545, but "'[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,'" id. at 545-46 (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)). Subsequently, the Court formulated a variation of the "special needs" standard applicable to adjudication of constitutional claims of those lawfully confined: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987); see Overton v. Bazzetta, 539 U.S. 126, 132-33 (2003); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987).

Strip searches performed on those lawfully confined have provoked considerable litigation. In Wolfish, the Supreme Court upheld a strip search, including visual inspection of body cavities, of sentenced prisoners and pretrial detainees, after every contact visit with a

person from outside the institution.[8] 441 U.S. at 558-60. This Court has upheld routine random strip searches, including body-cavity inspections, performed on prison inmates. See Covino v. Patrissi, 967 F.2d 73, 76-80 (2d Cir. 1992); see also Hurley v. Ward, 584 F.2d 609, 612 (2d Cir. 1978) (reversing portion of injunction prohibiting strip searches of prison inmates). However, in several decisions, we have ruled that strip searches may not be performed upon adults confined after arrest for misdemeanors, in the absence of reasonable suspicion concerning possession of contraband. See Shain v. Ellison, 273 F.3d 56, 62-66 (2d Cir. 2001); Wachtler v. County of Herkimer, 35 F.3d 77, 81 (2d Cir. 1994); Walsh v. Franco, 849 F.2d 66, 68-69 (2d Cir. 1988); Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986). But see Shain, 273 F.3d at 70-76 (Cabranes, J., dissenting) (contending that Weber had been superseded by the Supreme Court's decision in Turner and that this consequence should have led to upholding the strip search policies in

[8]The contact visit apparently provided a generalized, though not an individualized, basis for concern that the inmate might have acquired contraband. This suggests that, as to those lawfully confined, a specific basis for concern about contraband will support strip searches, even absent a basis for individualized suspicion. One Justice appears to attach little, if any, importance to the fact that the searches in Wolfish were limited to inmates after contact visits. In granting a stay as Circuit Justice, then-Justice Rehnquist viewed Wolfish as applying Fourth Amendment standards "to the practice of conducting strip-searches of persons detained after being charged with a crime." Clements v. Logan, 454 U.S. 1304, 1309 (chambers opinion), vacated, 454 U.S. 1117 (1981).

Shain, Wachtler, and Walsh). As far as we can tell, all the circuits to have considered the issue have reached the same conclusion with respect to strip searches of adults confined for minor offenses. See Miller v. Kennebec County, 219 F.3d 8, 12 (1st Cir. 2000) (failure to pay fine); Logan v. Shealy, 660 F.2d 1007, 1012-13 (4th Cir. 1981) (drunk driving); Kelly v. Foti, 77 F.3d 819, 821-22 (5th Cir. 1996) (motor vehicle violations); Masters v. Crouch, 872 F.2d 1248, 1253-55 (6th Cir. 1989) (failure to appear for motor vehicle violation); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1266, 1268-73 (7th Cir. 1983) (various misdemeanors); Jones v. Edwards, 770 F.2d 739, 740-42 (8th Cir. 1985) (refusal to sign complaint for leash law violation); Giles v. Ackerman, 746 F.2d 614, 615-19 (9th Cir. 1984) (motor vehicle violations); Chapman v. Nichols, 989 F.2d 393, 395-97 (10th Cir. 1993) (same).

Strip searches of children pose the reasonableness inquiry in a context where both the interests supporting and opposing such searches appear to be greater than with searches of adults confined for minor offenses. Where the state is exercising some legitimate custodial authority over children, its responsibility to act in the place of parents (in loco parentis) obliges it to take special care to protect those in its charge, and that protection must be concerned with dangers from others and self-inflicted harm. "Children . . . are assumed to

be subject to the control of their parents, and if parental control falters, the State must play its part as parens patriae. . . . In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's 'parens patriae interest in preserving and promoting the welfare of the child.'"[9] Schall v. Martin, 467 U.S. 253, 265 (1984) (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)) (upholding pretrial detention). At the same time, the adverse psychological effect of a strip search is likely to be more severe upon a child than an adult, especially a child who has been the victim of sexual abuse.[10]

In the pending case, neither side has called to our attention an appellate ruling on the reasonableness of strip searches of juveniles in lawful state custody, in the absence of individualized suspicion of possession of contraband. The Seventh Circuit has ruled unreasonable school officials' strip search of a 13-year-old female student to find

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[9]Although the Supreme Court used the phrase "parens patriae," it appears to have been referring to the state's responsibility when acting in loco parentis.

[10]One child psychologist, testifying at the trial, agreed that, at least "in theory," it would be traumatic for a child who had been sexually assaulted to be forced to expose her body to another individual. A recent study found that 29 percent of Connecticut's female juvenile detainees reported having been sexually abused. See John F. Chapman, Sherrie Wasilesky & Michael Zuccaro, "Assessment of the Psychiatric Needs of Children in Connecticut's Juvenile Detention Centers: A Report to the Deputy Chief Court Administrator's Task Force on Overcrowding" 23 (Nov. 27, 2000).

narcotics, in the absence of reasonable cause to believe she possessed any narcotics. See Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980). Unlike S.C. and T.W., the student searched in Doe was not confined in a detention facility. The Eleventh Circuit has upheld strip searches of incarcerated juveniles, but only upon a showing of reasonable suspicion of possession of contraband. See Justice v. City of Peachtree City, 961 F.2d 188, 193 (11th Cir. 1992). A district court has ruled unconstitutional strip searches of detained juvenile aliens conducted by the Immigration and Naturalization Service. See Flores v. Meese, 681 F. Supp. 665 (C.D. Cal. 1988).

Against this background of pertinent but not precisely governing case law, we consider the claims in the pending case. Connecticut acknowledges that its strip search policy "is not related to the investigation of criminal acts," Br. for Appellees at 19, and contends that the individualized suspicion requirement associated with criminal law enforcement is therefore not applicable. Instead, the State contends that the Policy comports with the "special needs" test of Earls and, alternatively, is reasonably related to legitimate penological interests so as to satisfy the test of Turner.

In determining whether the strip searches of S.C. and T.W. violated the Fourth Amendment under the standards of either Earls or Turner, we first consider the nature of the intrusion upon the girls'

privacy. A strip search with body-cavity inspection is the practice that "instinctively" has given the Supreme Court "the most pause." Wolfish, 441 U.S. at 558. The Seventh Circuit has described strip searches as "demeaning," "dehumanizing," and "terrifying." Mary Beth G., 723 F.2d at 1272 (internal quotation marks omitted). The Tenth Circuit has called them "terrifying." Chapman, 989 F.2d at 396. The Eighth Circuit has called them "humiliating." Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982). And since "youth . . . is a . . . condition of life when a person may be most susceptible . . . to psychological damage," Eddings v. Oklahoma, 455 U.S. 104, 115 (1982), "[c]hildren are especially susceptible to possible traumas from strip searches," Flores, 681 F. Supp. at 667.

In assessing the interests served by the strip searches, we think the searches must be considered separately since the justifications are not the same for each search. The second, third, and fifth searches of S.C. and the second search of T.W. were conducted after the children's transfer from one facility to another. Upon their initial admission to a detention facility, they had been strip searched, and they remained in custody throughout the transfer process. For example, after being searched upon admission to NHJDC, S.C. was transferred to court, transferred back to NHJDC, and then transferred to GDC. There is no indication that she had any unsupervised opportunity to acquire

contraband during these transfers. Whatever the justification for strip searches upon initial admission to a first detention facility, we see no state interest sufficient to warrant repeated strip searches simply because of transfers to other facilities.[11] See Hodges v. Stanley, 712 F.2d 34, 35 (2d Cir. 1983) (second search of administrative detainee appears to be unnecessary and unreasonable when detainee had been under continuous escort after initial search). Arguably, it was more convenient for the personnel at GDC to strip search S.C. upon her admission there, rather than determine whether she had been strip searched upon her prior admission to NHJDC and had remained in custody throughout the transfer process. Mere convenience, however, cannot be a sufficient interest to justify such a serious impairment of privacy. We recognize that unavoidable circumstances might arise, even during a period of continuous custody, that create opportunities for an inmate to acquire contraband, in which event a strip search might well be reasonable. No such circumstances were shown in this case.

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[11]In papers submitted after oral argument in response to the Court's inquiry, the Defendants contend that strip searches are not conducted upon arrival at one institution after transfer from another institution. See Letter from Terrence M. O'Neill, Ass't Attorney General, to Hon. Sonia Sotomayor of Sept. 4, 2003, at 3. However, the evidence is to the contrary. The testimony the Defendants cite stated only that a search was not performed when an inmate was transferred out of an institution, not that there was no search upon arrival at the new institution.

Of course, a prior strip search and continuous custody thereafter cannot guarantee protection from subsequent access to contraband,[12] but the State's opportunity to maintain surveillance during custody after an initial strip search, in addition to the availability of other search techniques, renders unreasonable a subsequent strip search in the absence of reasonable suspicion of possession of contraband.

The sixth and seventh strip searches of S.C. occurred at JFS, prompted by the disappearance of a pencil on two separate occasions. Pencils had been handed out to a group of ten to twenty girls in a room, and one had not been returned. Since S.C. had already been strip searched upon her initial admission to JFS, a repeated search to see if S.C. had taken the missing pencil on either occasion required at least some reasonable suspicion pointing to her as the culprit. We have ruled that strip searches of those arrested for misdemeanors require reasonable suspicion of possession of contraband. See Shain, 273 F.3d at 62-66. Although we recognize the possibilities that a pencil could be used as a weapon and could be concealed in a body-

[12]A supervisor at JFS testified that a strip search was performed after transportation from NHJDC because it would be "foolish" to rely on the searching at NHJDC and because contraband might have been picked up during transport or off the desk of a probation officer. One of the managers of Juvenile Forensic Services, LLP testified that an inmate of JFS once admitted that she stole a paper clip during a court appearance and used it to mutilate herself while being transported in a van back to JFS.

cavity, the combination of these possibilities alone is too unlikely to justify the serious intrusion of a strip search, in the absence of reasonable suspicion concerning possession of the missing item. Such reasonable suspicion might arise if less intrusive searches such as pat-downs of the girls in the room where the pencil disappeared failed to locate it, raising suspicion that one of the girls in that room had the pencil concealed.[13]

With respect to the searches performed upon the girls' initial admission to state custody, the issue is closer. To justify the searches under the Turner standard would extend that standard beyond the context in which it was established--a prison. 482 U.S. at 89. S.C. and T.W. were confined in juvenile detention facilities. They had not been convicted of any crime, and were not confined awaiting trial on any criminal charges. On the other hand, contraband such as a knife or drugs can pose a hazard to the security of an institution and the safety of inmates whether the institution houses adults convicted of crimes or juveniles in detention centers. Yet before we can uphold a search as reasonably related to penological interests, there must be some justification for placing the person searched into the type of institution where the Turner standard applies. Perhaps the Turner

[13]Since the pencils were numbered, it would not have been difficult to keep track of which girls had which pencils, thereby pinpointing the girl who had not turned in the missing pencil.

standard applies to a state facility confining juveniles who have been convicted of conduct that would be a crime if committed by an adult, and, perhaps it even applies to juveniles awaiting trial for such conduct. This would be so if "penological interests" include the interests of a state in confining juveniles convicted of, or awaiting trial for, such conduct. If that is so, there would be a substantial argument that a strip search of juveniles upon their initial admission to such a facility would satisfy the Turner standard of being reasonably related to valid penological interests.

But it is far from clear that the Turner standard applies to juveniles confined for running away from home or failing to attend school, even where such conduct occurs in violation of a court order. Whatever a state's interests in confining such juveniles in order to discharge its substitute parent responsibilities, we doubt that such confinement serves the sort of penological interests the Supreme Court had in mind in fashioning a standard applicable to adult prisons. No doubt a state has a legitimate interest in confining such juveniles in some circumstances, but it does not follow that by placing them in an institution where the state might be entitled, under Turner, to conduct strip searches of those convicted of adult-type crimes, a state may invoke Turner to justify strip searches of runaways and truants.

Moreover, there is some basis for doubting that the Turner

standard applies to a claim of constitutional protection from state action such as a strip search. Turner concerned prisoners' assertion of affirmative rights to correspond with other prisoners and to marry. 482 U.S. at 81-82. The cases on which it relied, see id. at 84-87, concerned prisoners' assertion of affirmative rights to mail uncensored letters, Procunier v. Martinez, 416 U.S. 396, 407-12 (1974); to media interviews, Pell v. Procunier, 417 U.S. 817, 821-27 (1974); to organize a union, Jones v. North Carolina Prisoners' Union, Inc., 433 U.S. 119, 125-27 (1977); and to order books, Wolfish, 441 U.S. at 548-52.[14] Significantly, one of the factors the Supreme Court identified as pertinent to the reasonableness of a challenged prison regulation was the availability of "ready alternatives" for the prisoners to exercise their rights. Turner, 482 U.S. at 90. "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." Id. at 91. The consideration of alternative ways for the prisoner to exercise affirmative rights was an understandable part of the overall "reasonableness" inquiry in Turner

[14]Interestingly, in formulating the standard of "reasonably related to legitimate penological interests," Turner referred only to the Wolfish prisoners' affirmative claim to receive books, see Turner, 482 U.S. at 87, and made no mention of their claim to be free of strip searches conducted after contact visits.

and the cases it relied on, but has doubtful relevance to a prisoner's claim to be free from a constitutionally unreasonable search.

S.C. was initially confined for violating a court order not to run away from home, and T.W. was initially confined for violating a court order to attend school. The justification for impairing their constitutional rights for such conduct under the Turner rationale would seem to be less substantial even than that held insufficient for adults confined after arraignment on misdemeanor charges, see Shain, 273 F.3d at 62-66. Although such adults have not been convicted, there was at least probable cause to believe that they had committed crimes. For all of these reasons, we doubt that the strip searches of S.C. and T.W. can be upheld under the Turner rationale.

For several reasons, the State makes a more substantial contention in relying on the "special needs" standard of Earls. First, although the age of the children renders them especially vulnerable to the distressing effects of a strip search, it also provides the State with an enhanced responsibility to take reasonable action to protect them from hazards resulting from the presence of contraband where the children are confined. The State has temporarily become the de facto guardian of children lawfully removed from their home, and "when the government acts as guardian . . . the relevant question is whether the search is one that a reasonable guardian . . . might undertake,"

Vernonia, 515 U.S. at 665. The State has a more pervasive responsibility for children in detention centers twenty-four hours a day than for the children in Vernonia and Earls who were under State authority for the few hours of the school day. Second, a strip search serves the protective function of locating and removing concealed items that could be used for self-mutilation or even suicide.[15] Approximately one half of the girls admitted to JDCs showed signs of self-mutilation. A child psychologist testified that children often self-mutilate in part because of their inability to articulate their feelings. Third, a strip search will often disclose evidence of abuse that occurred in the home, and awareness of such abuse can assist juvenile authorities in structuring an appropriate plan of care.

The discovery-of-abuse factor raises two issues that require further consideration. The first is whether the factor may be considered at all in view of the testimony of an assistant supervisor at NHJDC that finding evidence of abuse is not one of the purposes of performing strip searches.[16] In considering the subjective purpose for

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[15]The fact that the searches discovered such items infrequently does not lessen the State's interest. With juveniles often brought to detention facilities on multiple occasions, many would become familiar with the searches, and the few instances of finding dangerous items may well indicate how effective the State's policy is as a deterrent.

[16]The Policy states that its intention is "to control contraband and detect potential illicit activities." Despite the absence of detecting abuse in the Policy's statement of purposes and the

which a search is undertaken, the Supreme Court has distinguished between a search of a particular individual and searches undertaken pursuant to a "general scheme without individualized suspicion." Indianapolis v. Edmond, 531 U.S. 32, 46 (2000). A law enforcement officer's subjective purpose is irrelevant to the lawfulness of the search of a particular individual, id. at 45; Whren v. United States, 517 U.S. 806, 813 (1996), but is relevant to the validity of a general search policy, such as one implemented incident to a roadblock, Edmond, 531 U.S. at 45-46. As to the latter, a primary purpose "to advance the general interest in crime control," id. at 44 n.1 (internal quotation marks omitted), will not suffice, id. at 44-48. Thus, searches incident to a road block set up for the primary purpose of apprehending drug law violators were held unreasonable, see id. at 48, while a primary public safety purpose of removing drunk drivers from the highways justified road blocks for sobriety checks, see Michigan Department of State Police v. Sitz, 496 U.S. 444, 450-55 (1990).

In the pending case, the evidence establishes the State's primary non-law enforcement purposes--to protect the children from harm inflicted by themselves or other inmates, and to protect the safety of

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disclaimer of such a purpose by the assistant supervisor at NHJDC, the Defendants contend on appeal that finding abuse is a purpose of strip searches, Br. of Appellees at 14, and not merely a helpful consequence. The State official responsible for promulgating the Policy testified that detecting abuse was one of its purposes.

the institution. With these valid purposes established, we think the additional purpose of detecting abuse may be weighed in the reasonableness assessment, even if it was not subjectively entertained by state officials. Whether or not this justification alone would support a strip search, it permissibly adds to the combination of "special needs" that confront the State at a child's initial admission to a detention facility. Discovery of abuse is not precluded from contributing to the reasonableness of searches undertaken primarily to protect the safety of the person searched and the institution.

The detecting-abuse factor also encounters the ruling we have made that protects parents' rights to control the care and custody of their children by assuring that intrusive examinations of their children for evidence of abuse will not be undertaken without parental consent or judicial authorization. See Tenenbaum v. Williams, 193 F.3d 581, 597-99 (2d Cir. 1999); van Emrik v. Chemung County Department of Social Services, 911 F.2d 863, 867 (2d Cir. 1990). However, those rulings concerned intrusions that "serve primarily an investigative function." Id. at 867. "The purpose was not to provide medical treatment to the child, but to provide investigative assistance to the caseworker." Id. Moreover, the intrusions at issue were x-rays, id. at 865, and medical examinations, Tenenbaum, 193 F.3d at 587. These rulings do not necessarily bar visual examinations for evidence of abuse undertaken

by custodians responsible for developing and implementing an appropriate plan of care and treatment.

The facts of this case do not yield an obvious answer to the question whether it was constitutionally "reasonable" to perform strip searches upon S.C. and T.W. upon their initial admission to detention facilities. Assessing all of the circumstances--the risks to the psychological health of the children from performing the searches and the risks to their well-being and to institutional safety from not performing the searches, we conclude that the strip searches upon initial admission do not violate Fourth Amendment standards. However, since we do not reach the same conclusion with respect to repetitive searches undertaken after the children had been searched and remained in custody, absent any reasonable basis to think that they had acquired and secreted contraband while in custody, we rule that the second, third, and fifth searches of S.C. and the second search of T.W. were unlawful. As to the sixth and seventh searches of S.C. (concerning a missing pencil), we will permit the parties on remand to amplify the record so that the District Court can make findings as to the existence of reasonable suspicion.

Class action ruling. The denial of class action certification was well within the District Court's discretion, for reasons set forth in Judge Dorsey's opinion.

Conclusion

The judgment dismissing the action is vacated, and the case is remanded for further proceedings with respect to the sixth and seventh searches of S.C. and for determination of what relief, if any, is warranted as a result of our ruling that the second, third, and fifth searches of S.C. and the second search of T.W. were unlawful.